IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2005/HCV 00241

BETWEEN	**STACY-ANN RHOOMS (Trading as Trans-Auto)**	**CLAIMANT**
AND	**INSURANCE COMPANY OF THE WEST INDIES**	**DEFENDANT**

Mr. Earle Delisser and Miss Reba Harper instructed by Williams & Young for the Claimant

Miss Camille Wignall instructed by Nunes Scholefield DeLeon & Company for the Defendant

Heard: 7th October, 23rd November and 9th December 2009

Summary Judgment
Construction of word 'action' in Contract of Insurance
Time bar provision in Contract of Insurance
Effect of continued negotiations after limitation period expired

Sinclair-Haynes J

On the 17th day of December 2003 fire ravaged the business place of Stacy-Ann Rhooms (trading as Trans-Auto) (claimant) and destroyed goods valued at the sum of $8,884,650.98. The premises was insured by ICWI (defendant) against loss resulting from fire, theft, and/or burglary.

The defendant was notified of the fire. However, by letter dated 12th March 2004, ICWI refused to indemnify the claimant. On the 23rd March 2004, the claimant, wrote to the Financial Services Commission (FSC) and sought its intervention.

FSC advised the claimant in correspondence dated 20th April 2004 that its mandate did not permit it to determine such issues as they were "reserved for a court of law." On the 15th November 2004, the claimant informed the defendant of her intention to proceed to arbitration. The defendant agreed. The hearing was fixed for the 12th January 2005.

Prior to the hearing, on the 6th December 2004, the defendant informed the claimant through its consultants Alpha Plus Claims Consultants Limited that arbitration was not appropriate because it was a dispute of liability and not quantum. This was confirmed in writing on January 18, 2005.

On the 20th of January 2005, the claimant instituted proceedings against the defendant for breach of contract. The defendant, however, trenchantly resists this claim and alleges that the fire was deliberately set by the claimant or her servants and/or agent. The defendant has further applied for summary judgment on the ground that the claim was commenced outside of the time limit stipulated by the contract. The claimants, however, argue that this is not an appropriate case for summary judgment.

The Defendant's/Applicant's Claim for Summary Judgment

Miss Wignall rejects the argument that this application is not appropriate. She submits that the salient facts are not in dispute. She contends that the questions raised on this application turn on the construction and application of certain clear terms of a written contract and the facts relevant to those terms are not in dispute. She relies on the case of **Fortisbank S A v Trenwick International Limited & Others** [2005] EWHC 399.

Miss Wignall submits that the claimant has no real prospect of succeeding on her claim because the action was instituted outside the period limited for doing so under the policy.

The defendant's contention is that clause (4) of the policy provided that benefits under the policy would be forfeited if a claim is made and rejected and action or suit is not commenced within three (3) months after such rejection.

Further, Condition 12 provides that unless the claim is the subject of an action or pending arbitration, the company is not liable for any loss or damage after the expiration of 12 months from the occurrence of loss or damage.

She further contends that the claimant filed the action on the 26th January 2005, which was more than 12 months after the fire and more than three months after the defendant's letter rejecting the claim, thereby forfeiting any benefit to which she might have been entitled.

Further, she submits that the Contract does not allow for arbitration because the dispute concerns liability and, in any event, in November 2004 when the claimant requested that they proceed to arbitration, her action was already barred.

Claimant's Arguments

Miss Harper maintains that this is not an appropriate application for summary judgment. She relies on the authority of **Munn v North West Water Ltd and Preston Borough Council** (2001) CP Rep. 48.

It is also her contention that the claimant acted within the requirements of General Condition 4 (6) of the policy and she has not forfeited her benefits under the policy. She contends that on the 23rd March 2004, the day following the claimant's receipt of the

defendant's letter of refusal, she wrote to the FSC seeking its intervention in an effort to settle the matter out of court. It is her contention that pursuant to General Condition 7, both the claimant and the defendant referred the matter to arbitration. The defendant failed to attend. According to her, the action was instituted three months after the arbitration was concluded, hence within the time stipulated by the Contract.

Whether the Claim is a hopeless one

The issue is whether the claimant's claim is hopeless.

Part 15 of the Supreme Court of Jamaica Civil Procedure Rules (CPR) empowers the court to grant summary judgment on a claim or on a particular issue if it considers that there is no real prospect of succeeding on the claim or issue.

It is now quite settled that a hopeless claim should not be allowed to continue. However, if there are vital disputes of facts, the application will be inappropriate.

May LJ in the English Court of Appeal decision of **D.S. & R.L. v Gloucestershire County Council & London Borough of Tower & London Borough of Havering** 2000 EWCA Civ 72 (March 14, 2000), stated three conditions that need to be satisfied before an application for summary judgment can succeed:

i. all substantial facts relevant to the claimant's case which were reasonably capable of being before the court, must be before the court;

ii. those facts must be undisputed or there must be no reasonable prospect of successfully disputing them; and

iii there is no real prospect of oral evidence affecting the court's assessment of the facts.

The salient facts of this case are not disputed.

Clause 4 (b) of the contract reads:

> *"All benefits under this policy shall be forfeited if any claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of Condition number 7 of this policy) within three months after the arbitration or arbitrations or umpires shall have made their award."*

The language is generally clear and unambiguous. There is, however, a dispute as to the meaning of the word 'action.' The claimant contends that she complied with Condition 4 (b) as she took the necessary action by referring the matter to the FSC, by way of letter dated the 23rd March 2004. That letter, she contends, was within the time specified. According to her, such a referral is tantamount to an action.

Miss Wignall, however, argues that the proper interpretation of the clause 'action or suit' is court action or court suit, that is, proceedings before of a court of law. A letter to the FSC cannot amount to an action under the terms of the policy. She relies on the Barbadian case of **Nelista Rambally et al v Barbados Fire and General Insurance Company Limited** SLU HCV 1179/2000 delivered October 31, 2005.

She submits that in giving effect to the intention of the parties to the contract of insurance, the meaning of the word 'action' as used in condition 4 (b) cannot be removed from its context and should be given the natural meaning upon reading the policy in its entirety. She relies on the Privy Council decision of **GPR SA, Artag Meridian Ltd, Caribbean Energy Company v The Liquidators of Bancredit Cayman LTD. in official liquidation** [2009] UKPC39.

Ruling

It is plain from the context of the clause, that 'action' refers to legal action. The word 'action' is followed by the word 'suit.' Indeed a conjunction separates them. Action is therefore to be construed *ejusdem generis* with these words.

Blacks Law Dictionary (8th edition 2004) defines action as:

> *"A civil or criminal judicial proceeding. – Also termed* ***action*** *at law. [Cases:* ***Action*** *1. C.J.S.* ***Actions*** *2-9, 11, 17, 21, 32-33, 36.]*
> *"An* ***action*** *has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. But in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceedings, which, if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment."*
> *1* ***Morris m. Estee, Estee's Pleadings, Practice, and Forms*** *3, at 1 (****Carter P. Pomeroy*** *ed., 3d ed. 1885).*
> *"The terms 'action' and 'suit' are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of law as 'actions,' and of those in courts of equity as 'suits.' In olden time there was a more marked distinction, for an action was considered as terminating when judgment was rendered, the execution forming no part of it. A suit on the other hand, included the execution. The word 'suit' as used in the Judiciary Act of 1784 and later Federal statutes, applies to any proceedings in a court of justice in which the plaintiff pursues in such courts the remedy which the law affords him."*
> *Edwin E. Bryant,* ***The Law of Pleading Under the Codes Of Civil Procedure 3*** *(2D ED. 1899).*
> *'Action,' in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined." UCC 1-201 (b) (1).*
> ***Action at law.*** ***"****A civil suit stating a legal cause of action seeking only a legal remedy."*

***Osb*ourn's Concise Law Dictionary,** 10th edition, page 18 states:

> *"In early times actions were divided into criminal and civil, the former being proceedings in the name of the Crown, and the latter those in the name of a subject. "Action" generally meant a proceeding in one of the Common law courts, as opposed to suit in equity. Actions were divided into real, personal, and mixed: real (or Feudal) actions being those for the specific recovery of Lands or other realty; personal actions, those for the recovery of a debt, personal chattel, or damages; and Mixed actions, those for the recovery of real property, together with damages for a wrong connected with it."*

Applying the *noscitur a sociis* principle of legal interpretation, it is clear from the context of the section of the Contract that the word 'action' is legal or quasi-legal action of formal arbitration. Thus the mention of the word 'suit' and 'pending' added to the word 'action,' could only be in contemplation of legal action.

The FSC Act outlines the functions of the FSC. The FSC's function is primarily supervisory and regulatory. The determination of issues of facts is not one of its functions. Consequently, it advised the claimant that its mandate did not permit it to determine issues of facts.

Further Submission by Miss Reba Harper on behalf of the Claimant

Mrs. Reba Harper, however, submits that by accepting to proceed to arbitration, the defendant is estopped from relying on clause 12 of the insurance policy because it led the claimant to believe that the time limits set by the policy were no longer applicable. She relies on **Central London Property Trust Limited v High Trees House Limited** (1947) KB 140 and **Combe v Combe** (1951) 2 KB 215.

Miss Camille Wignall rejects this argument. She relies on the Privy Council case of **Super Chem Products Ltd v American Life and General Insurance Co. Ltd. and**

others (2004) 2 AER 358 and **Seechurn v Ace Insurance SA - NV** [2002] EWCA Civ 67.

Ruling

Clause 12 which sets the time limit states:

> *"In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."*

Lord Cairns' decision in **Hughes v Metropolitan Railway Co.,** (1877) 2 App. Cas. 439 at page 488 is the *locus classicus:*

> *"... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which are thus taking place between the parties."*

There is no allegation that the defendant represented unequivocally to the claimant any intention not to strictly enforce its legal rights. Indeed there is no allegation of any promise at all (see **Seechurn v Ace Insurance SA - NV** [2002] EWCA Civ 67).

Steyn's LJ, Statement in **Super Chem Products Ltd v American Life and General Insurance Co. Ltd. and others** [2004] 2 AER 358 makes short shift of Miss Harper's submission. At page 368 he stated:

> *"The mere fact that one party continued to negotiate with the other party about the claim after*

> *the limitation period had expired, without anything being agreed about what happens if the negotiations breakdown cannot give rise to a waiver or estoppel."*

In any event, the contention relates to liability and not quantum. Clause 7 of the policy reads, 'if any difference shall arise as to the amount to be paid under the policy, such difference, shall independently of all other questions be referred for the decision of an arbitrator.' Clause 7 therefore speaks to the parties referring the matter to arbitration where there is a disagreement as to quantum. The claimant, however, declined to proceed under the Arbitration clause and instituted a claim in the Supreme Court. This claim was, however, filed outside of the three (3) months limitation from the date of rejection by the insurers of the claimant's claim.

Further, from the date of the fire to the date of the claimant's filing of this claim, twelve months had elapsed. The action was already barred.

Conclusion

The claimant failed to act within the time limits specified by the Contract.

Her claim is therefore bound to fail. She has no real prospect of succeeding. It is therefore in her best interest and that of the court that she be advised at the earliest opportunity in order to give effect to the overriding objective (See **Swain v Hillman**) [2001] 1 AER.

In the circumstances:

1. Summary judgment in favour of the defendant.
2. Costs to the defendant to be agreed or taxed.
3. Leave to Appeal granted to the claimant.